

1998

The Anti-Terrorism and Effective Death Penalty Act of 1996: A Return to Guilt by Association

Andy Pearson

Follow this and additional works at: <http://open.mitchellhamline.edu/wmlr>

Recommended Citation

Pearson, Andy (1998) "The Anti-Terrorism and Effective Death Penalty Act of 1996: A Return to Guilt by Association," *William Mitchell Law Review*: Vol. 24: Iss. 4, Article 1.

Available at: <http://open.mitchellhamline.edu/wmlr/vol24/iss4/1>

This Note is brought to you for free and open access by the Law Reviews and Journals at Mitchell Hamline Open Access. It has been accepted for inclusion in William Mitchell Law Review by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact sean.felhofer@mitchellhamline.edu.

© Mitchell Hamline School of Law

THE ANTI-TERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996: A RETURN TO GUILT BY ASSOCIATION

I. INTRODUCTION	1186
II. BACKGROUND	1186
A. <i>Terrorism Generally</i>	1186
B. <i>The AEDPA of 1996</i>	1187
C. <i>The First Amendment and the Freedom of Association</i>	1190
1. <i>The Origin of Freedom of Association</i>	1190
2. <i>Historical Treatment by Congress</i>	1192
3. <i>Xenophobia</i>	1194
4. <i>McCarthyism</i>	1197
a. <i>The Smith Act</i>	1197
b. <i>Other Anti-Communist Legislation</i>	1200
c. <i>Defining the Freedom to Associate: The NAACP Cases</i>	1203
5. <i>Recent Application: American-Arab Anti- Discrimination Committee v. Reno</i>	1205
III. ANALYSIS.....	1206
A. <i>Introduction</i>	1206
B. <i>AEDPA Section 1189: Designation of Foreign Terrorist Organizations Violates Procedural Due Process</i>	1206
1. <i>Background</i>	1206
2. <i>Application to Section 1189</i>	1206
a. <i>Individual Interest</i>	1208
b. <i>Procedures Provided</i>	1208
c. <i>Government Interest</i>	1210
3. <i>Conclusion</i>	1210
C. <i>Section 1182: Criminalizing Fundraising and Humanitarian Aid Violates the Freedom of Association</i>	1211
1. <i>Scales Analysis</i>	1211
2. <i>AAADC Analysis</i>	1214
3. <i>Conclusion</i>	1215
IV. CONCLUSION.....	1215

I. INTRODUCTION

This article examines the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA).¹ Specifically, this article analyzes the first amendment and due process implications of sections 1189 and 1182, which enable the Secretary of State to create a list of "foreign terrorist organizations," as well as analyzes the sections which criminalize international fundraising and humanitarian aid.²

The AEDPA gives the Government enormous discretion to determine which political movements and organizations are legitimate and which are not.³ A recent ruling by the Ninth Circuit Court of Appeals challenged the constitutionality of this act.⁴ The court held that these sections violate freedom of association.⁵ This article will argue that under the AEDPA, the black lists of the McCarthy era will reappear as official lists of "foreign terrorist organizations" and Immigration and Naturalization Service (INS) "watch lists" of suspected terrorists.⁶

II. BACKGROUND

A. *Terrorism Generally*

On April 19, 1995, a Ryder truck carrying a 4800-pound fertilizer-and-fuel-oil bomb exploded at the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma, killing 168 people and wounding over 600 others.⁷ On the one year anniversary of this tragedy, President Clinton signed into law the Anti-Terrorism and Effective Death Penalty Act of

1. See 8 U.S.C. § 1189 (Supp. II 1996).

2. See *id.* §§ 1189 & 1182.

3. See *id.* §§ 1189(a)(1) & 1182(a)(3)(B). Special interest groups criticize this large grant of discretion. See, e.g., NETWORK AGAINST THE "COUNTER-TERRORISM" ACT, THE ANTI-TERRORISM AND EFFECTIVE DEATH PENALTY ACT: REPRESSION UNDER THE GUISE OF PROTECTING THE PEOPLE 3.

4. See *American-Arab Anti-Discrimination Committee v. Reno*, 70 F.3d 1045 (9th Cir. 1995).

5. See *id.* at 1063-65.

6. Not surprisingly, the American Civil Liberties Union (ACLU) warns of this eventuality:

History teaches that grave threats to liberty often come in terms of urgency, when . . . rights seem too extravagant to endure . . . when we allow fundamental freedoms to be sacrificed in the name of real or perceived exigency, we invariably come to regret it . . . the first, and worst, casualty . . . will be the precious liberties of our citizens.

THE AMERICAN CIVIL LIBERTIES UNION, CIVIL LIBERTIES IMPLICATIONS OF THE ANTI-TERRORISM ACT OF 1995 (1996).

7. Note, *Blown Away? The Bill of Rights After Oklahoma City*, 109 HARV. L. REV. 2074, 2074 (1996).

1996 (AEDPA).⁸ The purpose of this bill was to replace the then-existing patchwork terrorism legislation, and insert a comprehensive policy which would enable the government to fully combat both domestic and international terrorism.⁹

Terrorism is defined by the Oxford English Dictionary as “[a] policy intended to strike with terror those against whom it is adopted; the employment of methods of intimidation; the fact of terrorizing or condition of being terrorized.”¹⁰ Today, terrorism is often defined as “membership in a clandestine or expatriate organization aiming to coerce an established government by acts of violence against it or its subjects.”¹¹

B. *The AEDPA of 1996*

AEDPA section 1189 empowers the Secretary of State to create a list of foreign terrorist organizations.¹² The Secretary must find that the organization (1) is foreign; (2) engages in terrorist activity; and (3) threatens the security of the United States or United States nationals.¹³ Conduct within the definition of “terrorist activity” under section 1189 also includes threats, attempts and conspiracies to commit such conduct.¹⁴ The Secre-

8. Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended at 8 U.S.C. § 1189 (Supp. II 1996)).

9. See Note, *supra* note 7, at 2074.

10. THE OXFORD ENGLISH DICTIONARY 821 (2d ed. 1989).

11. Caleb M. Pilgrim, *Terrorism in National and International Law*, 8 DICK. J. INT'L L. 147, 150 (1990).

12. See 8 U.S.C. § 1189(a)(1) (Supp. II 1996).

13. See *id.*

14. See *id.* § 1182(a)(3)(B)(ii). The statute reads:

[T]he term “terrorist activity” means any activity which is unlawful under the laws of the place where it is committed and which involves any of the following:

(I) The hijacking or sabotage of any conveyance (including an aircraft, vessel or vehicle).

(II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.

(III) A violent attack upon an internationally protected person (as defined in section 1116(b)(4) of Title 18) or upon the liberty of such a person.

(IV) An assassination.

(V) The use of any—

(a) biological agent, chemical agent, or nuclear weapon or device, or

(b) explosive or firearm (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.

tary's decision may be based upon classified information.¹⁵ This information is not subject to disclosure, except for an ex parte in camera judicial review.¹⁶ National security under section 1189 refers to the national defense, foreign relations, or economic interests of the United States.¹⁷

Seven days before making a designation under section 1189, the Secretary must notify the leaders of Congress of his or her intent.¹⁸ This notice must include his or her findings regarding the organization's terroristic activities and the factual basis underlying her decision.¹⁹ Following congressional notification, the designation is published in the Federal Register.²⁰

Once designated a foreign terrorist organization, the Secretary of the Treasury may freeze the assets of the organization in all United States financial institutions.²¹ These assets remain frozen indefinitely, pending further directives from the Secretary of the Treasury, an Act of Congress, or court order.²²

A foreign terrorist designation is effective for two years.²³ The Secre-

(VI) A threat, attempt, or conspiracy to do any of the foregoing.

Id.

15. *See id.* § 1189(a) (3) (B). The statute reads:

The Secretary may consider classified information in making a designation under this subsection. Classified information shall not be subject to disclosure for such time as it remains classified, except that such information may be disclosed to a court ex parte and in camera for purposes of judicial review under subsection (c) of this section.

Id.

16. *See id.*

17. *See id.* § 1189(c) (2).

18. *See id.* § 1189(a) (2) (A). The statute reads:

Seven days before making a designation under this subsection, the Secretary shall, by classified communication—

(i) notify the Speaker and Minority Leader of the House of Representatives, the President pro tempore, Majority Leader, and Minority Leader of the Senate, and the members of the relevant committees, in writing, of the intent to designate a foreign organization under this subsection, together with the findings made under paragraph (1) with respect to that organization, and factual basis therefore.

Id.

19. *See id.*

20. *See id.* § 1189(a) (2) (A) (ii).

21. *See id.* § 1189(a) (2) (C). The statute reads:

Upon notification under paragraph (2), the Secretary of the Treasury may require United States financial institutions possessing or controlling any assets of any foreign organization included in the notification to block all financial transactions involving those assets until further directive from either the Secretary of the Treasury, Act of Congress, or order of court.

Id.

22. *See id.*

23. *See id.* § 1189(a) (4) (A). The statute reads, "subject to paragraphs (5) and

tary of State may redesignate an organization at the end of the initial two year period.²⁴ He or she must fulfill the same requirements as with the initial designation.²⁵

A foreign organization may challenge the Secretary of State's designation.²⁶ The appeal must come within thirty days of publication in the Federal Register.²⁷ The appeal is brought in the United States Court of Appeals for the District of Columbia Circuit.²⁸ The basis of the review is solely upon the administrative record made by the Secretary stating his or her initial findings.²⁹ The Government may also submit to the court, for ex parte in camera review, classified information used in making the designation.³⁰ The court must set aside a designation as unlawful if it finds the designation (1) arbitrary, capricious, abuse of discretion, or not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitation, or short of statutory right; (4) lacking substantial support; or (5) not procedurally correct.³¹ AEDPA section 1182 also makes it a crime to raise and contribute funds, donate educational and humanitarian supplies, or to provide lodging, transportation or other forms of "material support" to designated foreign terrorist groups.³² The only exceptions to this rule are

(6), a designation under this subsection shall be effective for all purposes for a period of 2 years beginning on the effective date of the designation under paragraph (2)(B)." *Id.*

24. *See id.* § 1189(a)(4)(B). The statute reads:

The Secretary may redesignate a foreign organization as a foreign terrorist organization for an additional 2-year period at the end of the 2-year period referred to in subparagraph (A) (but not sooner than 60 days prior to the termination of such period) upon a finding that the relevant circumstances described in paragraph (1) still exist. The procedural requirements of paragraphs (2) and (3) shall apply to a redesignation under this subparagraph.

Id.

25. *See id.*

26. *See id.* § 1189(b)(1). The statute reads:

Not later than 30 days after publication of the designation in the Federal Register, an organization designated as a foreign terrorist organization may seek judicial review of the designation in the United States Court of Appeals for the District of Columbia Circuit.

Id.

27. *See id.*

28. *See id.*

29. *See id.* § 1189(b)(2). The statute reads: "Review under this subsection shall be based solely upon the administrative record, except that the Government may submit, for ex parte and in camera review, classified information used in making the designation." *Id.*

30. *See id.*

31. *See id.* § 1189(b)(3)(A)–(E).

32. *See id.* § 1182(a)(3)(B)(iii). The statute reads:

(III) Engage in terrorist activity defined: As used in this chapter, the term "engage in terrorist activity" means to commit, in an individual capacity

medicine and religious materials.³³ This could prohibit making donations to the legal defense funds of Zapatista or IRA political prisoners, or sending funds or supplies to medical clinics and Islamic schools in the Palestinian West Bank.³⁴ Even attempts and conspiracies to provide such aid could be prohibited.³⁵ Those convicted of this new federal crime will face up to ten years in prison.³⁶

C. *The First Amendment and the Freedom of Association*

1. *The Origin of the Freedom of Association*

For more than the first one hundred years after its ratification, the First Amendment was held to prohibit prior restraint by the federal government, and little if anything else.³⁷ The phrase "Congress shall make no law" was strictly construed.³⁸ States were free to regulate speech, but restrictions by the federal government were limited.³⁹

Freedom of expression encompasses freedom of speech, freedom of the press, freedom of association, freedom of assembly, and freedom to petition the government for redress.⁴⁰ The Supreme Court has written that freedom of expression is "the matrix, the indispensable condition, of nearly every other form of freedom."⁴¹ Other fundamental rights, such as

or as a member of an organization, an act of terrorist activity or an act which the actor knows, or reasonably should know, affords material support to any individual, organization, or government in conducting a terrorist activity at any time, including any of the following acts: . . .

(IV) The soliciting of funds or other things of value for terrorist activity or for any terrorist organization.

(V) The solicitation of any individual for membership in a terrorist organization, terrorist government, or to engage in a terrorist activity.

Id.

33. *See id.*

34. *See* NETWORK AGAINST THE "COUNTER-TERRORISM" ACT, THE ANTI-TERRORISM AND EFFECTIVE DEATH PENALTY ACT: REPRESSION UNDER THE GUISE OF PROTECTING THE PEOPLE 3.

35. *See* 8 U.S.C. § 1182(a)(3)(B)(ii)(VI) (Supp. II 1996).

36. *See id.* § 1182.

37. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 1008 (5th ed. 1995) (stating that the First Amendment directive that "Congress shall make no law" was generally followed).

38. *See id.*; *see also* Robert Plotkin, *First Amendment Challenges To The Membership and Advocacy Provisions of The Antiterrorism and Effective Death Penalty Act of 1996*, 10 GEO. IMMIGR. L.J. 623, 626-627 (1996).

39. *See* NOWAK & ROTUNDA, *supra* note 37, at 1008; *see also* Plotkin, *supra* note 38, at 627. "Although the language of the First Amendment prohibiting regulation of speech might seem clear cut and absolute to modern eyes, it was essentially unenforced until the twentieth century." *Id.*

40. *See* Palko v. State of Connecticut, 302 U.S. 319, 327 (1937).

41. *Id.*

the right to vote, could not exist without it.⁴²

The United States Supreme Court has expressly held that the freedom of association is a fundamental right protected by the First Amendment.⁴³ The Court held that although "association" does not appear in the actual wording of the Amendment, "freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."⁴⁴

Freedom of association is considered essential to the speech and assembly provisions protected by the First Amendment.⁴⁵ The Supreme Court stated "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association."⁴⁶ The Court further observed that an "individual's freedom to speak, to worship, and to petition the Government for redress of grievances could not be vigorously protected from interference by the state unless a correlative freedom to engage in group effort toward those ends were not also guaranteed."⁴⁷

42. See *id.*

43. See *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). See also ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES & POLICIES* 943, 944 (1997) (stating that the freedom of association is a fundamental right guaranteed by the First Amendment); see also Joan Steinman, *Privacy of Association: A Burgeoning Privilege in Civil Discovery* 17 HARV. C.R.-C.L. L. REV. 355, 360 (1982) (stating "[f]reedom of association has itself consistently been recognized as implicitly guaranteed by the first amendment to the Constitution.").

44. *NAACP v. Alabama*, 357 U.S. at 460; see also CHERMERINSKY, *supra* note 43, at 943; Steinman, *supra* note 43, at 360. "Compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] effective . . . restraint on freedom of association Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *Id.* (citing *NAACP v. Alabama*, 357 U.S. at 462).

45. See CHERMERINSKY, *supra* note 43, at 943.

46. *NAACP v. Alabama*, 357 U.S. at 460. In this case, the Court declared unconstitutional an Alabama law which required that out-of-state corporations meet certain disclosure requirements. See *id.* at 449. In connection with this law, Alabama required disclosure of the NAACP's membership lists. See *id.*

47. *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984). In *Roberts*, the United States Jaycees brought suit challenging the Minnesota Human Rights Act which ordered them to admit women to its local Minnesota chapters. See *id.* at 609. Justice Brennan, writing for the Court, explained that the application of the Minnesota Act compelling the Jaycees' acceptance of women as regular members did not constitute an abridgement of the members' freedom of association. See *id.* at 630-631. See generally Ronald Garet, *Communality and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1001 (1983) (providing an overview of the rights of groups under the Constitution).

2. *Historical Treatment by Congress*

In September 1901, President Theodore Roosevelt, in his first speech to Congress, urged legislators to exclude aliens who acted on anarchist principles, who simply believed in or espoused anarchist principles, or those aliens who belonged to anarchist societies.⁴⁸ Roosevelt's speech marked the first time in American history that a president gave sanction to find guilt by association.⁴⁹

Congress responded to Roosevelt's call by enacting the Immigration Act of 1903.⁵⁰ This Act was the first immigration legislation to exclude persons solely on the basis of their ideology or affiliation, rather than their actual activity.⁵¹ The Act excluded "anarchists, or persons who believe in or advocate the overthrow by force or violence of the government of the United States . . . or of all forms of law. . . ."⁵² The Supreme Court affirmed the constitutionality of the act,⁵³ thereby affirming congressional dominance in the field and effectively gave constitutional approval to the guilt by association doctrine.⁵⁴

Throughout the next five decades, Congress enacted various immigration acts, designed to limit immigration for those who espoused controversial views.⁵⁵ The highlight in the entrenchment of guilt by associa-

48. See Keisha A. Gary, *Congressional Proposals to Revive Guilt by Association: An Ineffective Plan to Stop Terrorism*, 8 GEO. IMMIGR. L.J. 227, 230 (1994); see also Mitchell C. Tilner, *Ideological Exclusion of Aliens: The Evolution of a Policy*, 2 GEO. IMMIGR. L.J. 1 (1987).

49. See Gary, *supra* note 48, at 230.

50. Act of March 3, 1903, ch. 1012, § 2, 32 Stat. 1213-14.

51. See Gary, *supra* note 48, at 230; see also Leonard David Egert, Note, *Granting Foreigners Free Speech Rights: The End of Ideological Exclusions?*, 8 CARDOZO ARTS & ENT. L.J. 721, 724-25 (1990).

52. Egert, *supra* note 51, at 724 (quoting Act of March 3, 1903). The Act did not define "anarchist", but a person described as being excluded by this Act was one who "disbelieves in or who is opposed to all organized government . . . or who advocates or who teaches the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers, either of . . . the Government of the United States or of any other organized government, because of his or their official character. . . ." Gary, *supra* note 48, at 230; see also Act of March 3, 1903, ch. 1012, § 38, 32 Stat. 1213, 1221.

53. See *United States ex rel. Turner v. Williams*, 194 U.S. 279 (1904). John Turner, a British citizen and labor organizer, was arrested and ordered deported for his announcement in a public speech that he was an anarchist. See *id.* at 280-81. In an appeal to the United States Supreme Court, Turner charged that the ideological exclusion was unconstitutional because Congress had exceeded its powers. See *id.* at 289. Turner also challenged the 1903 Immigration Act based upon his First Amendment freedom of speech or belief. See *id.* The Court held the Congress had the plenary power to exclude whomever it chooses for whatever reasons, including ideological grounds. See *id.* at 291.

54. See Gary, *supra* note 48, at 230.

55. See Act of February 20, 1907, ch. 1134 § 2, 34 Stat. 898, 899 (preventing those who believe in polygamy from immigrating to the United States); Act of Feb-

tion came with the passage of the McCarran-Walter Act in 1952.⁵⁶ This Act gave government officials wide, unchecked discretion to exclude persons on ideological grounds, presuming aliens automatically guilty of being a threat to the United States because of their beliefs and associations.⁵⁷

The McCarran-Walter Act survived virtually intact for twenty-five years.⁵⁸ In 1977, Congress passed the McGovern Amendment.⁵⁹ This permitted excludable aliens the right to apply for a waiver when their exclusion was based on membership in an organization deemed threatening under the mandates of McCarran-Walter.⁶⁰

Finally, in a sweeping overhaul of United States immigration law, Congress passed the Immigration and Nationality Act of 1990.⁶¹ This Act served to effectively repeal McCarran-Walter.⁶² All ideological, associational, or speech grounds for exclusion were repealed.⁶³ Congress finally

ruary 5, 1917, ch. 29 § 3, 39 Stat. 874, 875-78 (stating "ideology" is grounds for deportation); Act of June 5, 1920, ch. 251 § 1, 41 Stat. 1008, 1009 (limiting immigration to those not involved in "questionable organizations"); Alien Registration Act of 1940, ch. 439, tit. II, § 23, 54 Stat. 670, 673 (codified at 18 U.S.C. § 2385 (1940)) (excluding and deporting those who believed in or advocated proscribed doctrines); Act of May 25, 1948, ch. 338, 62 Stat. 268 (excluding those who posed a threat to public safety); Internal Security Act of 1950, ch. 1024, § 22, 64 Stat. 987, 1006-07 (codified as amended at 8 U.S.C. § 1101, 1182 (1982)) (preventing communists and fascists from immigrating to the United States).

56. McCarran-Walter Act, ch. 477, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101-1524 (1990)).

57. *See id.*; *see also* Gary, *supra* note 48, at 235 (stating that McCarran-Walter Act gave government officials significant discretion in excluding persons on ideological grounds because of their beliefs and associations).

58. *See* Gary, *supra* note 48, at 236.

59. *See* Foreign Relations Authorization Act, Fiscal Year 1978, Pub. L. No. 95-105, Tit. I, § 21, 91 Stat. 848 (codified as amended at 22 U.S.C. § 2691 (1988) (repealed 1990)).

60. *See id.* The text of the statute reads:

The Secretary of State should, within 30 days of receiving an application for a non-immigrant visa by any alien who is excludable from the United States by reason of membership in or affiliation with a proscribed organization but who is otherwise admissible to the United States, recommend that the Attorney General grant the approval necessary for the issuance of a visa to such alien, unless the Secretary of State determines that the admission of such alien would be contrary to the security interests of the United States. . . . Nothing in this section may be construed as authorizing or requiring the admission to the United States of any alien who is excludable for reasons other than membership in or affiliation with a proscribed organization.

Id.

61. Immigration Act of 1990, Pub. L. No. 101-649 § 212, 104 Stat. 4978 (codified as amended at 8 U.S.C. § 1182 (Supp. II 1996)).

62. *See* Gary, *supra* note 48, at 240.

63. *See* Immigration Act of 1990, Pub. L. No. 101-649 § 212(a) (3), 104 Stat. 4978 (1990) (codified as amended at 8 U.S.C. § 1182(a)(3) (1990)). The Act provides:

refuted guilt by association as a guiding force in United States immigration law.⁶⁴

3. *Xenophobia*

History demonstrates that governments have tried to restrict controversial beliefs through government directives. The United States' involvement in World War I significantly altered Congress' perception of the First Amendment.⁶⁵ A national mood of great anxiety and fear of foreigners generally, communists specifically, as well as others viewed as subversive spread throughout the nation.⁶⁶ The first piece of legislation passed in response to citizens' concerns was the Espionage Act of 1917.⁶⁷

(a) Classes of excludable aliens

Except as otherwise provided in this chapter, the following describes classes of excludable aliens who are ineligible to receive visas and who shall be excluded from admission into the United States: . . .

(3) Security and related grounds

(A) In general

Any alien who a consular officer or the Attorney General knows, or has reasonable ground to believe, seeks to enter the United States to engage solely, principally, or incidentally in —

- (i) any activity to violate any law of the United States relating to espionage or sabotage or to violate or evade any law prohibiting the export from the United States of goods, technology, or sensitive information,
- (ii) any other unlawful activity, or
- (iii) any activity a purpose of which is the opposition to, or the control or overthrow of, the Government of the United States by force, violence, or other unlawful means, is excludable.

(B) Terrorist activities

(i) In general

Any alien who —

- (I) has engaged in a terrorist activity, or
- (II) a consular officer or the Attorney General knows, or has reasonable ground to believe, is likely to engage after entry in any terrorist activity is excludable. An alien who is an officer, official, representative, or spokesman of the Palestinian Liberation Organization is consider, for the purposes of this chapter to be engaged in terrorist activity.

Id.

64. See Gary, *supra* note 48, at 240.

65. See NOWAK & ROTUNDA, *supra* note 37, at 1008; see also Plotkin *supra* note 64, at 627 (stating "[t]he first modern wave of First Amendment litigation arose out of federal legislation passed during World War I and its aftermath.").

66. See NOWAK & ROTUNDA, *supra* note 37, at 1008; see also Plotkin, *supra* note 38, at 627 (noting the "United States involvement in the War and the concurrent Bolshevik Revolution in Russia created a national mood of great anxiety and fear of foreigners, Communists, and others viewed as subversive both to the war effort and to the nation as a whole.").

67. See Act of June 15, 1917, ch. 30, § 3, 40 Stat. 217, 219. The Espionage Act

In 1919 the Secretary General of the Socialist Party in the United States was charged with conspiracy to violate the Espionage Act of 1917.⁶⁸ *Schenck v. United States* represents the first time that the United States Supreme Court addressed the modern notion of free speech.⁶⁹ Schenck's alleged violation came as a result of his printing and distributing to enlisted men and potential draftees, a document which argued that the conscription violated the Thirteenth Amendment.⁷⁰ The charge further alleged that the document "[i]n impassioned language . . . intimated that conscription was despotism in its worst form and a monstrous wrong against humanity in the interest of Wall Street's chosen few."⁷¹ The document further urged readers to "Assert Your Rights" by opposing the draft.⁷² Schenck was found guilty of causing and attempting to cause insubordination in the military forces of the United States and of obstructing the recruiting and enlistment of the armed forces during wartime.⁷³ The Supreme Court affirmed his conviction.⁷⁴

Justice Holmes, writing for the majority, accepted the doctrine of constructive intent,⁷⁵ in which Schenck's intent to violate the Espionage Act could be inferred from his act of publication and distribution.⁷⁶ Justice Holmes then established the "clear and present danger" test for incitement to lawless action. The Court held that Congress has a right to restrict intentional speech if "the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to

of 1917 prohibited, *inter alia*, "during wartime: (1) causing or attempting to cause insubordination in the United States military forces, (2) obstructing or conspiring to obstruct the recruiting and enlistment service of the United States, and (3) using or conspiring to use the mails for the transmission of materials declared to be non-mailable by the Postmaster General." *Schenck v. United States*, 249 U.S. 47, 50 (1919) (citing the Espionage Act of 1917); *see also* NOWAK & ROTUNDA, *supra* note 37, at 1009; Plotkin, *supra* note 38, at 627.

68. *See Schenck*, 249 U.S. at 50-51. Schenck was convicted of violating the Espionage Act for distributing a circular designed to influence people to obstruct the draft. *See id.*

69. *See id.*

70. *See id.* The document stated "[d]o not submit to intimidation. . . your right to assert your opposition to the draft . . . if you do not assert and support your rights, you are helping to deny and disparage rights which it is the solemn duty of all citizens and residents of the United States to retain." *Id.* at 51.

71. *Id.*

72. *Id.*

73. *See id.* at 47.

74. *See id.* at 53.

75. *See* NOWAK & ROTUNDA, *supra* note 37, at 1009.

76. *See Schenck*, 249 U.S. at 51. The Court stated that the evidence of publication and distribution was sufficient to demonstrate intent because "the document would not have been sent unless it had been intended to have some effect, and [the court does] not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out." *Id.*

prevent."⁷⁷

Schenck's actions, which obstructed the recruitment for the armed forces, were an example of a substantive evil for which he could constitutionally be convicted.⁷⁸ The government needed to prove his intent to obstruct recruitment, as well as the fact that his speech had the natural tendency to bring about such obstruction.⁷⁹ This standard of review became known as the "bad tendency" test.⁸⁰ Restricted speech was allowable so long as the speech's "natural tendency and reasonably probable effect" was to cause unlawful action.⁸¹

77. *Id.*; see also *Abrams v. United States*, 250 U.S. 616 (1919) (Holmes, J., dissenting). Justice Holmes, arguing for the adoption of the "marketplace of ideas" approach stated, "[t]he best test of truth is the power of the thought to get itself accepted in the competition of the market." *Id.* at 618. Further, Justice Holmes stated that people should be free to express unpopular opinions, "unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country." *Id.* at 630; see also *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring). Justice Brandeis, arguing for the usage of the "clear and present danger" test, stated that suppressing speech requires "a reasonable ground to fear that serious evil will result if free speech is practiced." *Id.* Further, he argued that there must be reasonable ground to believe that the danger apprehended is both serious and imminent. See *id.* Lastly, he argued that without incitement, advocacy alone is not a justification for denying free speech. See *id.*

78. See *Schenck v. United States*, 249 U.S. 47, 51 (1919); see also Plotkin, *supra* note 38, at 628 (stating "[o]bstruction of recruitment for the armed forces was one such evil for which Schenck could constitutionally be convicted if he had the intent to obstruct recruitment or if his speech had the natural tendency to bring about such obstruction . . .").

79. See *Schenck*, 249 U.S. at 52.

80. See *Whitney v. California*, 274 U.S. 357, 376 (1927). Whitney was convicted of violating the California Criminal Syndicalism Act by assisting in the organization of the Communist Labor Party of California. See *id.* The Statute defined criminal syndicalism as any doctrine "advocating, teaching or aiding and abetting . . . crime, sabotage . . . or unlawful acts of force and violence" to effect political or economic change. *Id.* at 359 (quoting the California Criminal Syndicalism Act). The Supreme Court upheld her conviction. See *id.* at 379. Justice Brandeis, in his concurrence, stated

But even advocacy of [law] violation however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on. . . . No danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion.

Id. at 376 (Brandeis, J., concurring); see also NOWAK & ROTUNDA, *supra* note 37, at 1012 (stating that the test used by the court in *Whitney* became known as the bad tendency test).

81. *Debs v. United States*, 249 U.S. 211, 216 (1919). Debs was convicted for violating the Espionage Act of 1917. See *id.* Debs, a prominent Socialist of the time, allegedly encouraged listeners and readers to obstruct the recruiting service. See *id.* at 211. Debs published a document which read "[w]e brand the declaration

In *Abrams v. United States*,⁸² the defendants, all Russian nondeclarant aliens, were charged with conspiring during wartime to print publications which were intended to harm the reputation of the United States government and which were intended to "incite, provoke, and encourage resistance to the United States in [the war effort]."⁸³ This constituted a violation of the Espionage Act of 1918.⁸⁴ The Supreme Court held that advocacy may be prohibited even if it is not directly intended to bring about a harm which is within the power of the government to prevent, if the natural consequence of the advocated acts is to bring about such harm.⁸⁵ In his dissent, Justice Holmes stated "a deed is not done with intent to produce a consequence unless that consequence is the aim of the deed."⁸⁶ Holmes advocated the use of the "clear and present danger" test when he stated "[i]t is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned."⁸⁷

4. *McCarthyism*

Throughout the 1950s, 1960s and early 1970s, the Supreme Court reviewed numerous cases involving members of the Communist Party. These cases typically centered on state organizations attempting to prohibit or punish Communist Party membership.⁸⁸ When the Court found a strong state interest in disclosure and a close connection between that interest and the information sought, it upheld forced disclosure of associational ties.⁸⁹

a. *The Smith Act*

In 1940, Congress passed the Smith Act.⁹⁰ The Act prohibited the acquisition or holding of knowing membership in any organization which

of war by our Government as a crime against the people of the United States and against the nations of the world. In all modern history there has been no war more unjustifiable than the war in which we are about to engage." *Id.* at 216; see also NOWAK & ROTUNDA, *supra* note 37, at 1009.

82. 250 U.S. 616 (1919).

83. *Id.* The article at issue stated "[t]he Russian Revolution cries: Workers of the World! Awake! Rise! Put down your enemy and mine! Yes friends, there is only one enemy of the workers of the world and that is CAPITALISM. . . . Awake! Awake you Workers of the World! REVOLUTIONISTS!" *Id.* at 620.

84. See *id.* at 617-18. The Espionage Act of 1917 was amended to include the kinds of activities with which the defendants were charged. See *id.*

85. See *id.* at 623-24.

86. *Id.* at 627.

87. *Id.* at 628.

88. See Steinman, *supra* note 43, at 366 (stating that in the 1950s and 1960s, the Court frequently upheld legislative policies requiring the disclosure of individual's possible Communist Party affiliations).

89. See *id.*

90. 18 U.S.C. § 2385 (1940).

advocates the overthrow of the Government of the United States by force or violence.⁹¹ Following its passage, at the height of the Cold War, the Court reviewed a series of cases challenging the constitutionality of the act.⁹² The Smith Act was challenged as an unconstitutional infringement upon their rights to associational privacy.⁹³

The first case challenging the constitutionality of the Smith Act was *Dennis v. United States*.⁹⁴ Chief Justice Vinson, writing for the Court, applied the "clear and present danger" test.⁹⁵ He stated that the Smith Act prohibited willful advocacy of the overthrow of Government by force or violence.⁹⁶

Prohibiting the organization of any group advocating overthrow of Government, the Court held, is not unconstitutional on the ground that it stifles ideas and violates guarantees of free speech and press, because it is directed at advocacy, not discussion.⁹⁷ Justice Vinson further stated, "[i]f Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required."⁹⁸ The Court adopted a balancing test for protecting the freedom of association stating "in each case [courts] must ask whether the gravity of the evil, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."⁹⁹ In his concurring opinion, Justice Frankfurter stated "[t]hroughout our decisions there has recurred a distinction between the statement of an idea which may prompt its hearers to take unlawful action, and advocacy that such action be taken."¹⁰⁰

The Court upheld the trial court's ruling that the requisite danger

91. *See id.*

92. *See Dennis v. United States*, 341 U.S. 494 (1951); *Yates v. United States*, 354 U.S. 298 (1957); NOWAK & ROTUNDA, *supra* note 37, at 1008.

93. *See id.*

94. 341 U.S. 494 (1951). In *Dennis*, petitioner was convicted of conspiring to organize the Communist Party of the United States as a group to teach and advocate the overthrow of the Government of the United States by force and violence. *See id.* at 494.

95. *See id.* at 508. The Court stated "In this case we are squarely presented with the application of the 'clear and present danger' test . . ." *See id.*

96. *See id.* at 502. The Court stated, "Congress did not intend to eradicate the free discussion of political theories, to destroy the traditional rights of Americans to discuss and evaluate ideas without fear of governmental sanction." *Id.*

97. *See id.* The Court stated, "[t]he very language of the Smith Act negates the interpretation which petitioners would have us impose on that Act. It is directed at advocacy, not discussion." *Id.*

98. *Id.*

99. *Id.*; *see also* NOWAK & ROTUNDA, *supra* note 37, at 1008 (stating that the *Dennis* Court balanced the danger of government overthrow coupled with the probability of such action against the individual's right to free speech).

100. *Dennis*, 341 U.S. at 545.

existed to convict Dennis.¹⁰¹ It stated that the “inflammable nature of the world conditions” coupled with petitioner’s “highly organized conspiracy [supported] the finding that there was a sufficient danger to warrant the application of the statute.”¹⁰²

Five years after deciding *Dennis*, the Court once again reviewed the constitutionality of the Smith Act in *Yates v. United States*.¹⁰³ In *Yates*, petitioners were prosecuted for “conspiring to advocate and teach the overthrow of the government by force and violence and to organize, as the Communist Party of the United States, a society of persons who so advocate and teach, with intent of causing overthrow of government by force and violence.”¹⁰⁴

Justice Harlan, writing for the Court, reiterated the Court’s holding in *Dennis*.¹⁰⁵ He stated the question for the Court was whether the evidence, viewed in the light most favorable to the Government, supported the conclusion that the Party engaged in language “reasonably and ordinarily calculated to incite persons to . . . action immediately or in the future.”¹⁰⁶ The advocacy of “mere abstract doctrine of forcible overthrow” according to Justice Harlan was protected speech.¹⁰⁷ Justice Harlan further stated that the essence of the *Dennis* holding was that indoctrination of a group in preparation for future violent action, as well as incitement to immediate action is not constitutionally protected.¹⁰⁸ Specifically, advocacy employing language of incitement found to be directed to action for the accomplishment of forcible overthrow, or to violence as a rule or principle of action does not fall within the First Amendment.¹⁰⁹

However, the *Yates* Court stated that the district court held “that mere doctrinal justification of forcible overthrow, if engaged in with the intent to accomplish overthrow, is punishable per se under the Smith Act.”¹¹⁰ The Court held “[t]hat sort of advocacy, even though uttered with the hope that it may ultimately lead to violent revolution, is too remote from concrete action to be regarded as the kind of indoctrination preparatory to action which was condemned in *Dennis*.”¹¹¹

Therefore, the Court held that *Yates*’ mere teaching of Communist theory, including the teaching of moral propriety or even moral necessity for a resort to force and violence, did not constitute preparing a group for

101. See *id.* at 494.

102. *Id.* at 510-11.

103. 354 U.S. 298(1957).

104. *Id.*

105. See *id.* at 316.

106. *Id.*

107. *Id.*

108. See *id.*

109. See *Yates v. United States*, 354 U.S. 298, 321(1957).

110. *Id.*

111. *Id.* at 322.

violent action and inciting it to such action.¹¹²

b. Other Anti-Communist Legislation

In *Barenblatt v. United States*,¹¹³ the Court upheld convictions for contempt of Congress of persons who refused to divulge whether they were or ever had been members of the Communist Party.¹¹⁴ The court reasoned that the state's interest in self-preservation outweighed the individual's rights to associational privacy.¹¹⁵

The Court came to a similar conclusion in *Communist Party of the United States v. Subversive Activities Control Board*.¹¹⁶ In this case, the Court found constitutional legislation requiring the Communist Party to file registration statements listing all pertinent information of its officers and members.¹¹⁷ The Court distinguished this case from *NAACP* and *Bates*, by stressing the significant state interest involved.¹¹⁸

Similarly, in *Konigsberg v. State Bar of California*,¹¹⁹ and *In Re Anastaplo*,¹²⁰ the Court upheld the right of states to deny admission to the bar based upon an applicant's refusal to answer questions concerning their past or present affiliation with the Communist Party.¹²¹ The Court held

112. See *id.* at 321.

113. 360 U.S. 109 (1959). When summoned before Congress, Barenblatt refused to answer questions regarding whether he was or ever had been a member of the Communist Party. See *id.* See also *Braden v. United States*, 365 U.S. 431 (1961) (upholding conviction of individual who refused to answer question regarding past Communist Party membership); *Wilkinson v. United States*, 365 U.S. 399 (1961) (upholding conviction of individual who refused to answer question regarding present Communist Party membership).

114. See *Barenblatt*, 360 U.S. at 113. Barenblatt was convicted under 2 U.S.C. § 192 (1950), which made it illegal for any person summoned to appear before Congress to refuse to answer any question pertinent to the question under inquiry. See *id.*

115. See *id.* at 134. "We conclude that the balance between the individual and the governmental interests here at stake must be struck in favor of the latter, and that therefore the provisions of the First Amendment have not been offended." *Id.*

116. 367 U.S. 1 (1961). The act at issue in this case was the Subversive Activities Control Act. See *id.* at 4. This act required all Communist-action organizations to register with the Attorney General. See *id.* at 8.

117. See *id.*

118. See *id.* at 102. "The public opprobrium and obloquy which may attach to an individual listed . . . as a member of a Communist-action organization is no less considerable than that with which members of the NAACP were threatened in NAACP and Bates." *Id.* However, this case is different "in the magnitude of the public interests which the registration and disclosure bear to the protection of those interests." *Id.*

119. 366 U.S. 36 (1961).

120. 366 U.S. 82 (1961).

121. In *Konigsberg*, the Court held that *Konigsberg* was not constitutionally justified in refusing to answer the certification committee's questions regarding his Communist Party affiliation. *Konigsberg*, 366 U.S. at 36. In *Anastaplo*, the Court held that the state could adopt a court-made rule precluding admission to the

that the state's interest in having only attorneys who are devoted to the law in the broadest sense, outweighed the individual's right to free association.¹²²

In *Scales v. United States*,¹²³ the court abandoned the balancing test and set forth a new three-part test used to determine when the government may prohibit or punish group membership.¹²⁴ The Court held that the government may punish membership in a group only if it proves that a person is actively affiliated with a group, knowing of its illegal objectives, and has the specific intent to further those objectives.¹²⁵ In *Scales*, the Court affirmed the conviction of the Chairman of the North Carolina and South Carolina Districts of the Communist Party under the "membership clause" of the Smith Act.¹²⁶ This clause made a felony "the acquisition or holding of knowing membership in any organization which advocates the overthrow of the Government by force or violence."¹²⁷ The Court held that earlier precedents had established that "the advocacy with which we are here concerned is not constitutionally protected speech, and it was further established that a combination to promote such advocacy, albeit under the aegis of what purports to be a political party, is not such association as is protected by the First Amendment."¹²⁸

Justice Harlan, writing for the Court, stated that the government's

practice of law of an applicant refusing to answer material questions concerning his Communist Party affiliation. *Anastaplo*, 366 U.S. at 82.

122. *Konigsberg*, 366 U.S. at 52. "With respect to . . . [the] same question of Communist Party membership, we regard the State's interest in having lawyers who are devoted to the law in its broadest sense . . . as clearly sufficient to outweigh the minimal effect upon free association occasioned by compulsory disclosure in the circumstances here presented." *Id.* See also *Anastaplo*, 366 U.S. at 89. "The State's interest in enforcing such a rule as applied to refusals to answer questions about membership in the Communist Party outweighs any deterrent effect upon freedom of speech and association, and hence that such state action does not offend the Fourteenth Amendment." *Id.*

123. 367 U.S. 203 (1961).

124. See *id.* at 229; see also CHEMERINSKY, *supra* note 37, at 944 (citing the Court's three-part test used to determine the constitutionality of the government's punishment of group membership).

125. See *Scales*, 367 U.S. at 229-30; CHEMERINSKY, *supra* note 37, at 944 (stating that the Court has held that the government may punish membership only if it proves that a person fulfills all three criteria); see also Nojeim Brief of Oral Testimony, Before the Subcomm. on Crime of the House Comm. on the Judiciary, 104th Cong., 1st Sess., 1-2 (1995). In his testimony, Nojeim, Legislative Counsel for the ACLU, stated that *Scales* "means that a person may not be punished merely on account of membership in an organization, members of which advocate violence or illegal activity. Rather, the person himself or herself must also have at least the specific intent to further the group's violent or unlawful aims." *Id.*

126. See *Scales v. United States* 367 U.S. 203, 203 (1961). The petitioners were charged with violating 18 U.S.C. § 2385 (1940). See *id.*

127. See *id.*

128. *Scales*, 367 U.S. at 228-29.

ability to prohibit such speech included the authority to forbid associations to further these ideas and activities.¹²⁹ He stated "[w]e can discern no reason why membership, when it constitutes a purposeful form of complicity in a group engaging in this same forbidden advocacy, should receive any greater degree of protection from the guarantees of that Amendment."¹³⁰ He further emphasized that *Scales* was being punished for his active affiliation with the Communist Party, knowing of its illegal objectives, and with proof that he "specifically intends to accomplish the aims of the organization by resort to violence."¹³¹

In *Noto v. United States*,¹³² the Court applied the three-part *Scales* test and reversed a conviction for membership in the Communist Party.¹³³ The Court held that the government failed to demonstrate the presence of "illegal advocacy."¹³⁴ The Court stressed that the speech was advocating abstract ideas.¹³⁵ Justice Harlan, writing for the Court, stated "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action."¹³⁶ He further stated "there must be some substantial direct or circumstantial evidence of a call to violence now or in the future which is both sufficiently strong and sufficiently pervasive . . . to justify the inference that such a call to violence may be fairly imputed to the Party as a whole. . . ."¹³⁷ There was no proof that Noto had the specific intent to further any illegal activities.¹³⁸ Therefore, the third element of the *Scales* test was missing and Noto's right to associa-

129. See *id.*; see also CHEMERINSKY, *supra* note 37, at 944 (stating that the government's power to suppress unprotected speech also included the power to restrict associations which further unprotected ideas and activities).

130. *Id.* at 229.

131. *Id.*

132. 367 U.S. 290 (1961). In *Noto*, petitioners were prosecuted under the membership clause of the Smith Act. See *id.*

133. See *id.*; see also CHEMERINSKY, *supra* note 37, at 945 (stating that the Court reversed a conviction for membership in the Communist Party because of the absence of "illegal activity").

134. *Noto*, 367 U.S. at 290.

135. See *id.* at 298-99; see also CHEMERINSKY, *supra*, note 37, at 945 (stating that the Court focused on the advocacy of abstract ideas as opposed to incitement to action).

136. *Noto*, 367 U.S. at 298.

137. *Id.* In *Noto*, "the Court found that an organization cannot be held criminally responsible for a call to violence issued by a limited subset of the individuals in the group." *Id.*

138. See *Noto*, 367 U.S. at 298. The Court stated "surely the offhand remarks that certain individuals hostile to the Party would one day be shot cannot demonstrate more than the venomous or spiteful attitude of the Party towards its enemies." *Id.* The Court further stated "there is no evidence that such acts of sabotage were presently advocated; and it is present advocacy, and not an intent to advocate in the future or a conspiracy to advocate in the future . . . which is an element of the crime under the membership clause." *Id.*

tional privacy could not be violated.¹³⁹

c. Defining the Freedom to Associate: The NAACP Cases

The two leading cases in defining the freedom to associate involve the National Association for the Advancement of Colored People (NAACP).

*NAACP v. Alabama ex rel Patterson*¹⁴⁰ is the first Supreme Court decision to recognize freedom of association as a constitutional right. The Court held that based upon the NAACP's "uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility," the required disclosure of its membership and agent lists to the Alabama Attorney General was likely to entail a substantial restraint upon NAACP members' exercise of their right to freedom of association.¹⁴¹ The Court further held that such compelled disclosure might negatively impact

139. See *id.* at 299. The Court stated:

this element of the membership crime . . . must be judged strictissimi juris [according to the strictest law] for otherwise there is a danger that one in sympathy with the legitimate aims of such an organization, but not specifically intending to accomplish them by resort to violence, might be punished for his adherence to lawful and constitutionally protected purposes, because of other and unprotected purposes which he does not share.

Id. at 299-300. The Court continued, "to permit an inference of advocacy from evidence showing at best only a purpose or conspiracy to advocate in the future would be to allow the jury to blur the lines of distinction between the various offenses punishable under the Smith Act." *Id.* at 298-99. The ACLU emphasized this reading of *Noto* in its testimony before Congress:

that a person who attends meetings of one of the groups, listens to every speaker including those who advocate violence, then decides he supports the lawful, but not the violent ends of the organization, cannot be held accountable for violent acts of others. It also means that absent compelling evidence, the group itself cannot be held accountable for the acts of a member or sympathizer.

Nojeim Brief of Oral Testimony, Before the Subcomm. on Crime of the House Comm. on the Judiciary, 104th Cong., 1st Sess., 1-2 (1995) (statement of Gregory T. Nojeim, Legislative Counsel, ACLU Washington Nat'l Office).

140. 357 U.S. 449 (1958); see also Steinman, *supra* note 43, at 360 (stating that *NAACP v. Alabama* is frequently cited as the first Supreme Court case to recognize freedom of association).

141. *NAACP v. Alabama*, 357 U.S. at 460; see also *Bates v. City of Little Rock*, 361 U.S. 561 (1960). In *Bates*, the Court relied upon the same principles to protect the privacy rights of NAACP members and contributors. See *id.* The Court concluded that mandatory disclosure of such lists would significantly interfere with the members' freedom of association. See *id.* See *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539 (1962). In *Gibson*, the Court held that the state failed to establish a substantial relationship between the information sought and a compelling state interest. See *id.* Therefore, the Court reversed *Gibson's* contempt conviction. See *id.*

membership for fear of the consequences of exposure.¹⁴² Finally, the Court held that Alabama had not demonstrated a compelling interest to justify the deterrent effect upon group membership.¹⁴³ Accordingly, the judgment of contempt was reversed.¹⁴⁴

*NAACP v. Claiborne Hardware*¹⁴⁵ is the second Supreme Court case defining the right to freely associate. The Court examined the danger of permitting the government excessive latitude in branding groups as violent and characterizing their activities as conspiracies.¹⁴⁶ In *Claiborne*, the NAACP sponsored a nonviolent picketing protest as a means to boycott white merchants.¹⁴⁷ However, it was undisputed that the NAACP also used a group known as the "Black Hats" to watch stores and engage in certain other "enforcement activities" that included acts of violence.¹⁴⁸

The Court struck down the 130 conspiracy judgements entered in a Mississippi state court.¹⁴⁹ The Court held "the right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected."¹⁵⁰ The Court stressed the danger of imposing liability on the entire group for the actions of some of its members, absent ratification or authorization of the unlawful conduct.¹⁵¹ Therefore, following *Claiborne*, a law may not punish association without more, but it may pro-

142. See *NAACP v. Alabama*, 357 U.S. at 463 (inviolability of privacy in group association may in many circumstance be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs).

143. See *id.* at 466 (stating "we conclude that Alabama has fallen short of showing a controlling justification for the deterrent effect on the free enjoyment of the right to associate which disclosure of membership lists is likely to have").

144. See *id.* (holding "that the immunity from state scrutiny of membership lists . . . is here so related to the right of the members to pursue their lawful private interests privately and to associate freely . . . as to come within the protection of the Fourteenth Amendment").

145. 458 U.S. 886 (1982).

146. See *id.*

147. See *id.*

148. See *id.* at 903.

149. See *id.*

150. *Id.* at 908.

151. See *id.* at 933-34. The Court stated:

A massive and prolonged effort to change the social, political and economic structure of a local environment cannot be characterized as a violent conspiracy simply by reference to the ephemeral consequences of a relatively few violent acts. Such a characterization must be supported by findings that adequately disclose the evidentiary basis for concluding that specific parties agreed to use unlawful means, that carefully identify the impact of such unlawful conduct, and that recognize the importance of avoiding the imposition of punishment for constitutionally protected activity. . . . A court must be wary of a claim that the true color of a forest is better revealed by reptiles hidden in the weeds than by the foliage of countless freestanding trees.

Id.

scribe association with an organization whose members strive to advance the group's violent goals.¹⁵²

An individual's right to freedom of association is most directly infringed if the government outlaws and punishes membership in a particular group.¹⁵³ The Supreme Court held that the government may punish membership only if it demonstrates that a person is actively affiliated with a group, knowing of its illegal objectives, and with the specific intent to further those objectives.¹⁵⁴

5. *Recent Application: American-Arab Anti-Discrimination Committee v. Reno*

A recent ruling by the Ninth Circuit Court of Appeals "casts serious doubt on the constitutionality of this law."¹⁵⁵ In *American-Arab Anti-Discrimination Committee v. Reno*,¹⁵⁶ the court ruled that people cannot be punished for fund raising for a so-called "terrorist organization" unless they have the specific intent to further the group's unlawful objectives.¹⁵⁷ In *Reno*, the court applied the "clear and present danger" test set forth by the United States Supreme Court in *Brandenburg*.¹⁵⁸ The court stated that advocacy may be punished only if it is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.¹⁵⁹ The government must establish a knowing affiliation and specific intent to further those illegal aims.¹⁶⁰ Further, the court held that guilt by associa-

152. See *id.* at 920.

153. See CHEMERINSKY, *supra* note 37, at 944 (stating that it is obvious that an individual's freedom of association is most directly infringed if the government outlaws and punishes membership in a group).

154. See *Scales v. United States*, 367 U.S. 203, 229 (1961). See also CHEMERINSKY, *supra* note 37, at 944 (stating that an individual must be actively engaged with a group and specifically intend to further the group's illegal objectives).

155. David Cole, *Terrorizing the Constitution*, THE NATION 11, 13 (1996).

156. 70 F.3d 1045 (9th Cir. 1995). In *Reno*, the INS arrested the eight named aliens in January, 1987. See *id.* at 1052. They were detained for several weeks in maximum security prisons, then released pending the outcome of their deportation hearings. See *id.* The INS charged all of the individuals under provisions of the McCarran-Walter Act of 1952 for membership in an organization, the Popular Front for the Liberation of Palestine (PFLP). See *id.* at 1053. The PFLP (a later designated "foreign terrorist organization") allegedly advocates the doctrine of world communism. See *id.*

157. See *id.* "The right of association is a basic constitutional freedom . . . [that] lies at the foundation of a free society. Government cannot deny rights and privileges solely because of a citizen's association with an unpopular organization." *Id.* at 1063.

158. See *id.*; see also *Abrams v. United States*, 250 U.S. 616 (1919) (analyzing the clear and present danger test).

159. See *Reno*, 70 F.3d at 1063.

160. See *id.*

tion alone violates the First Amendment.¹⁶¹

III. ANALYSIS

A. *Introduction*

AEDPA section 1189 fails to provide the procedural requirements necessary for the government to restrict an individual's liberty and property interests. Similarly, the government fails to demonstrate a compelling reason for AEDPA section 1182 which restricts an individual's right to freely associate. Each will be examined in turn.

B. *AEDPA Section 1189: Designation of Foreign Terrorist Organizations Violates Procedural Due Process*

1. *Background*

The focus of procedural due process is on procedural questions and procedural guarantees.¹⁶² The court's concern is with whether particular governmental decisions are made with the kind of procedural regularity that renders that decision procedurally valid in terms of due process.¹⁶³ Only governmental decisions that deprive a particular individual of an interest in life, liberty, or property raise such procedural due process questions.¹⁶⁴ Liberty interests generally refer to the ability to enjoy the privileges long recognized as essential to the orderly pursuit of happiness by free people.¹⁶⁵ A property interest requires that the individual have a legitimate claim of entitlement.¹⁶⁶ This entails more than an abstract need or desire or unilateral expectation of benefit.¹⁶⁷ The government must have made an individual determination about a particular individual or organization, and that individual determination must impose a burden on or deny a benefit to that individual in a way which infringes that individual's life, liberty, or property interests.¹⁶⁸

2. *Application to Section 1189*

AEDPA section 1189 provides that the Secretary of State, after con-

161. See *id.*

162. See WILLIAM A. KAPLIN, *THE CONCEPTS & METHODS OF CONSTITUTIONAL LAW* 143 (1992).

163. See *id.*

164. See *id.*

165. See *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 572 (1972).

166. See *id.* at 577.

167. See KAPLIN, *supra* note 162, at 144.

168. See *id.*

sulting with the Attorney General, will designate political groups based in other countries as "Foreign Terrorist Organizations."¹⁶⁹ The Secretary is authorized to designate a group as a terrorist organization if she finds (1) that it is a foreign organization, (2) that it engages in terrorist activities, and (3) the terrorist activities threaten the security of United States nationals or the National Security of the United States.¹⁷⁰

The first question under procedural due process analysis is whether there has been a deprivation of liberty or property.¹⁷¹ When liberty or property interests are at stake, the second question concerns the procedural protections necessary.¹⁷² The focus is on notice and opportunity for an adjudicative hearing.¹⁷³ Due process requires an opportunity to be heard at a meaningful time and in a meaningful manner.¹⁷⁴ The epitome of a due process hearing is a full judicial trial on the merits.¹⁷⁵ However, this type of procedure is not required in all cases.¹⁷⁶ Therefore, the question is how much procedure must be accorded the individual being deprived of the liberty or property interest.¹⁷⁷

The determination regarding how much procedural protection is required in a given context is made by balancing the relevant governmental and individual interests according to the three factor test established in

169. See 8 U.S.C. § 1189(a)(1) (Supp. II 1996). To date, the Secretary of State has designated thirty groups "foreign terrorist organizations." They are: Abu Nidal Organization (ANO), Abu Sayyaf Group (ASG), Armed Islamic Group (GIA), Aum Shinrikyo (Aum), Euzkadi Ta Askatasuna (ETA), Democratic Front for the Liberation of Palestine-Hawatmeh Faction (DFLP), HAMAS (Islamic Resistance Movement), Harakat ul-Ansar (HUA), Hizballah (Party of God), Gama'a al-Islamiyya (Islamic Group, IG), Japanese Red Army (JRA), al-Jihad, Kach, Kahane Chai, Khmer Rouge, Kurdistan Worker's Party (PKK), Liberation Tigers of Tamil Eelam (LTTE), Manuel Rodriguez Patriotic Front Dissidents (FPMR/D), Mujahe-din-e Khalq Organization (MEK, MKO), Nation Liberation Army (ELN), Palestine Islamic Jihad-Shaqaqi Faction (PIJ), Palestine Liberation Front-Abu Abbas Faction (PLF), Popular Front for the Liberation of Palestine (PFLP), Popular Front for the Liberation of Palestine-General Command (PFLP-GC), Revolutionary Armed Forces of Columbia (FARC), Revolutionary Organization 17 November (17 November), Revolutionary People's Liberation Party/Front (DHKP/C), Revolutionary People's Struggle (ELA), Shining Path (Sendero Luminoso, SL), Tupac Amaru Revolutionary Movement (MRTA). See OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, U.S. DEPARTMENT OF STATE, (October 8, 1997).

170. See 8 U.S.C. § 1189(a)(1) (Supp. II 1996).

171. See KAPLIN, *supra* note 162, at 144.

172. See *id.*

173. See *id.*

174. See *id.* (citing *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

175. See *id.* See also *Goldberg v. Kelly*, 397 U.S. 254 (1970).

176. See *Cleveland Bd. Of Educ. v. Loudermill*, 470 U.S. 532, 542-48 (1985) (holding that a pretermination hearing need not be elaborate and because the plaintiff was provided the right to respond to the allegations of false statements on his application that was sufficient to satisfy due process requirements).

177. See KAPLIN, *supra* note 162, at 144.

Matthews v. Eldridge.¹⁷⁸ The court must balance the private interest that will be affected by official action; the risk of erroneous deprivation of such interest through procedural safeguards, and the probable value, if any, of additional or substitute procedural safeguards; and the government's interest, including the function involved and the fiscal and administrative burdens that additional or substitute procedural requirements would entail.¹⁷⁹

a. Individual Interest

The private interest that will be affected by official action involves the fundamental rights of an organization.¹⁸⁰ This is the highest private interest an individual possesses.¹⁸¹ The designation of foreign terrorist organizations involves both liberty and property interests. AEDPA section 1189 infringes on the organization's ability to make contracts, be free from the stigma associated with being designated terroristic, and the ability to enjoy the privileges long recognized as essential to the orderly pursuit of happiness by free men.¹⁸² Similarly, because designation results in freezing the organizations assets, there is also a property interest at stake.¹⁸³

b. Procedures Provided

The second stage of the *Matthews* test involves the procedures provided by the government.¹⁸⁴ The procedural safeguards provided by AEDPA section 1189 are very minimal.¹⁸⁵ An essential principle of due process, however, is that a deprivation of life, liberty, or property be preceded by notice and opportunity for hearing appropriate to the nature of

178. 424 U.S. 319, 334-35 (1976).

179. See *Matthews*, 424 U.S. at 335.

180. Fundamental rights include the freedom from bodily restraint, right to contract, right to engage in an occupation, right to acquire knowledge, right to marry, right to rear children, right to worship, right to be free from stigma, right to one's reputation, honor, and the right to enjoy the privileges long recognized as essential to the orderly pursuit of happiness by free men. See *Board of Regents of State College v. Roth*, 408 U.S. 564, 572 (1972).

181. See *Matthews*, 424 U.S. at 332-333; see also *Cleveland Bd. Of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985).

182. See *Roth*, 408 U.S. at 572. *Roth* states that liberty interests include the right to contract and "generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men." *Id.*

183. *Roth* generally describes what types of interests could be considered property rights. See *id.* at 576-78.

184. See *Matthews*, 424 U.S. at 335.

185. See 8 U.S.C. § 1189 (b)(1) (Supp. II 1996). Due process procedures include:

[A]dvance notice of the hearing date, opportunity to tell one's "side of the story" to an impartial decision maker, opportunity to present witnesses, opportunity to submit documentary evidence, opportunity to cross-examine adverse witnesses, opportunity to discover adverse evidence, the right to counsel or other representation, maintenance of a hearing record, and the right to a decision on the record.

KAPLIN, *supra* note 162, at 144.

the case.¹⁸⁶

Notice. The only notice provided to organization designated under AEDPA section 1189 constitutes publication in the Federal Register.¹⁸⁷ This notice applies after the designation and is only for the purpose of appeal.¹⁸⁸ There is no notice given prior to the designation by the Secretary.¹⁸⁹ Thus the notice requirement of due process is simply not met.

Opportunity to be heard. When protected interests are implicated, the right to some kind of prior hearing is paramount.¹⁹⁰ Under AEDPA section 1189, there is no opportunity for such a hearing.¹⁹¹ Along with the inability to have a pre-designation hearing, AEDPA section 1189 also fails to provide affected organizations with any form of meaningful opportunity to be heard post-designation.¹⁹² The terrorist organization can successfully appeal the distinction in court only if it can show that the designation was "arbitrary, capricious, an abuse of discretion not in accordance with the law, or lacking in substantial support."¹⁹³ This judicial review is largely illusory. The standard for what qualifies a group as terrorist relies on the Secretary's judgment as to what constitutes threats to our national security.

This standard is extremely deferential.¹⁹⁴ Few courts if any would second guess the Secretary in this area, because there is no way to measure activities which threaten the national security.¹⁹⁵ Similarly, because the determination may be based on secret evidence available only to the Secretary, it would be impossible for the group to even know the accusations against it so that it could effectively meet the charges.¹⁹⁶ Finally, few "foreign terrorist organizations" are allowed into the United States to challenge the Secretary's finding, thus emphasizing the lack of meaningful review.¹⁹⁷

AEDPA section 1189 fails to provide the procedural due process required by the Constitution. Generally, cases involving the fundamental

186. *See id.*

187. *See* 8 U.S.C. § 1189 (b)(1) (Supp. II 1996).

188. *See id.*

189. *See id.*

190. *See* *Matthews v. Eldridge*, 424 U.S. 319, 334 (1975).

191. *See* 8 U.S.C. § 1189 (b)(1) (Supp. II 1996).

192. *See id.*

193. *Id.* "The terrorist organization can successfully appeal the designation in court only if it can show that the Secretary of State's designation was arbitrary, capricious, an abuse of discretion not in accordance with the law, or lacking in substantial support." *Id.*

194. This deferential standard has been criticized. *See* Abdeen Jabara, *Political Repression By Another Name: The Omnibus Crime Control Act of 1995*, NATIONAL LAWYER'S GUILD, Winter 1997, at 38, 40.

195. *See* THE AMERICAN CIVIL LIBERTIES UNION, CIVIL LIBERTIES IMPLICATIONS OF THE ANTI-TERRORISM ACT OF 1995 (1996).

196. *See id.*

197. *See id.*

rights of an individual require pre-determination as well as post-determination hearings.¹⁹⁸ These hearings emulate full judicial trials on the merits.¹⁹⁹ AEDPA section 1189 fails to provide this type of hearing even on appeal.²⁰⁰ There is no opportunity to cross examine witnesses or confront an organization's accusers.²⁰¹ Instead, there is an ex parte in camera hearing to determine the Government's evidence coupled with an organization's opportunity to present its evidence.²⁰² The procedures provided are therefore inadequate.

c. Government Interest

The Government has a very strong interest in protecting the national security of the United States. Similarly, the Government has a strong interest in the fiscal effects which additional or substitute procedural requirements would entail.²⁰³

However, the essence of due process is the requirement that a person in jeopardy of serious loss be given notice of the case against him and have an opportunity to meet it.²⁰⁴ All that is necessary is that the procedures be tailored, in light of the decision to be made, to the capacities and circumstances of those who are to be heard, to ensure that they are given meaningful opportunity to present their case.²⁰⁵ AEDPA section 1189 fails to provide this opportunity. The cost of additional procedures is outweighed by the significant rights at stake.

3. Conclusion

Presidential administrations throughout the history of the United States have tried to create a balance between protecting United States national security and protecting an individual's procedural due process rights. The Supreme Court traditionally construes measures restricting an individual's fundamental rights very rigidly and provides many safeguards to ensure fairness.²⁰⁶ AEDPA section 1189 is another example of a legislative directive which requires strict scrutiny. The designation of foreign terrorist organizations results in the same types of discrimination for which the Supreme Court traditionally requires significant procedural

198. See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985).

199. See KAPLIN, *supra* note 162, at 144.

200. See 8 U.S.C. § 1189 (b)(2) (Supp. II 1996). The statute reads, "[r]eview under this subsection shall be based solely upon the administrative record, except that the Government may submit, for ex parte and in camera review, classified information used in making the designation." *Id.*

201. See *id.*

202. See 8 U.S.C. § 1189 (a)(3)(B) (Supp. II 1996).

203. See *Matthews v. Eldridge*, 424 U.S. 319, 347-48 (1975).

204. See *id.* at 348.

205. See *id.* at 349 (citations omitted).

206. See KAPLIN, *supra* note 162, at 145.

safeguards.²⁰⁷ AEDPA section 1189 fails to provide these safeguards.

C. *Section 1182: Criminalizing Fund Raising and Humanitarian Aid Violates the Freedom of Association*

1. *Scales Analysis*

The *Scales* test states that the Government may punish membership in an organization only if it can demonstrate a person is actively affiliated with a group, knowing of its illegal objectives, with the specific intent to further those objectives.²⁰⁸ The Court has held that membership within a group constitutes active affiliation.²⁰⁹ The Court has further viewed the components of the test as a whole, based on the totality of the circumstances.²¹⁰

In *Scales*, the Court analogized this test to criminal complicity.²¹¹ The Court stated that society cannot be powerless against those who work to bring about dangerous behavior.²¹² The Court focused on the difference between the fact of membership and the underlying substantive illegal conduct.²¹³ The Government must demonstrate the individual's criminal liability to satisfy *Scales*.²¹⁴ Failure to do so results in a violation of one's right to freely associate.²¹⁵

Criminalizing the legal, political, or charitable activities of a group constitutes guilt by association.²¹⁶ The practical effect of this law "will be

207. *See id.*

208. *See Scales v. United States*, 367 U.S. 203, 229 (1961).

209. *See Noto v. United States*, 367 U.S. 290, 299 (1961).

210. *See Scales*, 367 U.S. at 229.

211. *See id.* at 226. The Court stated:

Complicity has been defined thus: A person is an accomplice of another person in commission of a crime if:

(a) With the purpose of promoting or facilitating the commission of the crime, he

(1) commanded, requested, encouraged or provoked such other person to commit it; or

(2) aided, agreed to aid or attempted to aid such other person in planning or committing it * * *

(b) acting with knowledge that such other person was committing or had the purpose of committing the crime, he knowingly, substantially facilitated its commission.

Id. at 227 n.17 (quoting AMERICAN LAW INSTITUTE, MODEL PENAL CODE § 2.04(3) tentative draft No. 1 (1953)).

212. *See Scales*, 367 U.S. at 225.

213. *See id.* at 229.

214. *See id.*

215. *See id.*

216. *See* THE AMERICAN CIVIL LIBERTIES UNION, ACLU BACKGROUND BRIEFING: HOUSE TO CONSIDER OMNIBUS COUNTER-CONSTITUTION ACT (March 31, 1995). "To

devastating to the huge number of groups and individuals in the United States who are concerned about their . . . countries of origin, or about the welfare and human rights of people around the world."²¹⁷ The legislation makes giving a pencil to a school operated by a group designated a "foreign terrorist organization" a criminal act.²¹⁸

Had this bill been enacted a few years ago, it would have been illegal to provide support to the African National Congress in South Africa, because the United States once regarded the ANC as a "terrorist" organization.²¹⁹ Further, it would have been illegal for human rights groups, relief organizations and church-related groups to go to Central America and provide anything but medicine and religious materials.²²⁰

In some parts of the world, relief organizations have no choice but to work with organizations likely to be designated as "terrorist" organizations by the Secretary of State.²²¹ Oftentimes, relief organizations must pay fees or bribes to these groups.²²² To furnish any funds, goods, or services to such a group even in relief mission, would be a crime.²²³

The Aided group in Somalia, headed by Mohammed Farah Aided would likely have been designated a terrorist organization.²²⁴ In order to get their supplies to the needy people, many non-government organizations were required to give portions of their supplies and to hire guards supplied by the Aided group.²²⁵ Under this Act, paying off those guards with supplies or hiring the guards would be a criminal act.²²⁶ Even though the intent of the non-government organization was to save lives and not to further the violent, illegal activity of the Aided group, the act itself is still

be consistent with the Constitution, effective anti-terrorism legislation can prohibit only unlawful activity, not mere associations, because to do otherwise would be to operate on nothing less than guilt by association." *Id.*

217. NATIONAL COALITION TO PROTECT POLITICAL FREEDOM, COALITION CONDEMNS GOVERNMENT RELEASE OF LIST OF FOREIGN "TERRORIST ORGANIZATIONS" AS ATTACK ON CONSTITUTIONAL RIGHTS OF SPEECH, ASSOCIATION, AND RELIGION (October 8, 1997).

218. *See* THE AMERICAN CIVIL LIBERTIES UNION, CIVIL LIBERTIES IMPLICATIONS OF THE ANTI-TERRORISM ACT OF 1995 (1996).

219. *See id.*

220. *See* THE AMERICAN CIVIL LIBERTIES UNION, EXECUTIVE SUMMARY OF THE HOUSE TERRORISM BILL, H.R. 2768 (February 9, 1996); *see also* Peter Erlinder, *Cure is Worse Than Disease: Antiterrorist Law Threatens American Freedom*, STAR TRIBUNE (Mpls.), October 20, 1997, at A13. "[T]he constitutionally protected freedom of Americans to supply international humanitarian assistance in areas of conflict will be extinguished by changes in U.S. foreign policy or political administrations." *Id.*

221. *See* THE AMERICAN CIVIL LIBERTIES UNION, CIVIL LIBERTIES IMPLICATIONS OF THE ANTI-TERRORISM ACT OF 1995 (1996).

222. *See id.*

223. *See id.*

224. *See id.*

225. *See id.*

226. *See id.*

criminal.²²⁷

Similarly, the Secretary of State could designate the Zapatistas in Mexico a "foreign terrorist organization."²²⁸ The Zapatistas employ both lawful and unlawful means to press for land reform and political reform in Chiapas, Mexico.²²⁹ Once so designated, it would then become illegal to do relief work in Chiapas, if the relief organization furnished money or goods to any institution affiliated with the Zapatistas.²³⁰

The *Scales* Court specifically sought to avoid exactly what the AEDPA section 1182 seeks to do.²³¹ "There must be clear proof that a defendant specifically intends to accomplish the aims of the organization by resort to violence."²³² An individual who seeks to advance legitimate aims and policies through an organization does not fall within *Scales*.²³³ The requisite specificity to bring about the illegal aims of the organization is lacking.²³⁴ "Such a person may be foolish, deluded, or perhaps merely optimistic, but he is not . . . a criminal."²³⁵

The elements of the *Scales* test must be judged "strictissimi juris" because otherwise, there is a danger that one in sympathy with the legitimate aims of such an organization, but without the specific intent to further its illegal activities, might be punished for his adherence to lawful and constitutionally protected purposes.²³⁶ The Constitution does not allow such prosecutions.²³⁷

The Government cannot prove criminal liability by the affected individual in all cases under AEDPA section 1182. AEDPA section 1182 criminalizes raising and contributing funds, donating educational and humanitarian supplies, or providing lodging, transportation, or other forms of material support to designated foreign terrorist groups.²³⁸

AEDPA section 1182 creates many Freedom of Association concerns. It significantly restricts peoples' constitutional liberties in the name of fighting terrorism.²³⁹ It is not only "misguided", but "counterproductive" as well.²⁴⁰ It reintroduces to American criminal law the concept of guilt by

227. *See id.*

228. *See id.*

229. *See id.*

230. *See id.*

231. *See Scales v. United States*, 367 U.S. 203, 224 (1961).

232. *Id.*

233. *See id.*

234. *See id.*

235. *Id.* at 230.

236. *Noto v. United States*, 367 U.S. 290, 299-300 (1961).

237. *See id.*

238. *See* 8 U.S.C. § 1182 (a) (3) (B) (iii) (Supp. II 1996).

239. *See* THE AMERICAN CIVIL LIBERTIES UNION, CIVIL LIBERTIES IMPLICATIONS OF THE ANTI-TERRORISM ACT OF 1995 (1996).

240. *Cole, supra* note 155, at 13.

association.²⁴¹ As noted earlier, this notion was attempted during the McCarthy era, with disastrous results.²⁴² The purpose of the Act is to stifle aid to foreign terrorist groups.²⁴³ Past United States legislation aimed at preventing citizens from supporting foreign groups' criminal activities.²⁴⁴ This law goes one step further and criminalizes supporting that group's lawful activities. This law violates an individual's right to freely associate as established by the First Amendment.²⁴⁵

2. AAADC Analysis

In *AADC v. Reno*,²⁴⁶ the court coupled the *Scales* test with the clear and present danger test.²⁴⁷ The court ruled that advocacy may be punished only if it is directed to inciting or producing imminent lawless action and is likely to produce such a result.²⁴⁸ The court further stated that the Government must establish a knowing affiliation and specific intent to further those illegal aims.²⁴⁹

As noted previously, AEDPA section 1182 fails the *Scales* test. Therefore, under AAADC, the only remaining analysis involves the clear and present danger test.

The clear and present danger test requires "a reasonable ground to fear that serious evil will result if free speech is practiced."²⁵⁰ There must be reasonable ground to believe that the danger apprehended is both serious and imminent.²⁵¹ Without incitement, advocacy alone is not a justification for denying free association.²⁵²

AEDPA section 1182 fails to meet the clear and present danger criteria. Supporting the legal, political, or charitable activities of a group does not constitute incitement to lawless action.²⁵³ The criteria of AEDPA section 1182 fail to address this requirement. The government cannot demonstrate that criminalizing humanitarian aid to lawful institutions affiliated with foreign terrorist organizations constitutes a clear and present danger. There can be no showing that this act "so imminently threatens immediate interference with the lawful and pressing purposes of the law

241. See *id.*

242. See *id.*

243. See 8 U.S.C. §§ 1189 & 1182 (Supp. II 1996).

244. See *supra* Part II.C.

245. See *supra* Part II.C.

246. 70 F.3d 1045 (9th Cir. 1995).

247. See *id.* at 1063.

248. See *id.*

249. See *id.*

250. See *Whitney v. California*, 274 U.S. 357, 376 (1927).

251. See *id.*

252. See *id.*

253. See THE AMERICAN CIVIL LIBERTIES UNION, ACLU BACKGROUND BRIEFING: HOUSE TO CONSIDER OMNIBUS COUNTER-CONSTITUTION ACT (March 31, 1995).

that an immediate check is required to save the country.”²⁵⁴ Therefore, AEDPA section 1182 fails the clear and present danger test.

3. Conclusion

AEDPA section 1182 fails to acknowledge the Court’s requirements governing permissible reasons for infringing upon an individual’s right to freely associate. The Government fails to demonstrate that affected individuals under AEDPA section 1182 are actively affiliated with an organization, knowing of its illegal objectives, with the specific intent to further those objectives.²⁵⁵ Therefore, AEDPA section 1182 unconstitutionally infringes upon an individual’s right to freely associate.

IV. CONCLUSION

The 1996 Anti-Terrorism and Effective Death Penalty Act of 1996 violates an individual’s associational and due process rights. The sections providing for the Secretary of State creating a list of “foreign terrorist organizations”, as well as the sections which criminalize international fund raising and humanitarian aid represent a return of McCarthyism and guilt by association. These measures simply do not represent a solution to the problem of international terrorism.²⁵⁶

Andy Pearson

254. *Abrams v. United States*, 250 U.S. 616, 618 (1919).

255. *See Scales v. United States*, 367 U.S. 203, 225 (1961).

256. *See* NETWORK AGAINST THE “COUNTER-TERRORISM” ACT, THE ANTI-TERRORISM AND EFFECTIVE DEATH PENALTY ACT: REPRESSION UNDER THE GUISE OF PROTECTING PEOPLE:

First they came for the Communists, and I didn’t speak up because I wasn’t a Communist. Then they came for the Jews, and I didn’t speak up because I wasn’t a Jew. Then they came for the trade unionists, but I wasn’t a trade unionist. Then they came for the Catholics, and I didn’t speak up because I was a Protestant. Then they came for me, and by that time, no one was left to speak up.

Id. (quoting Pastor Martin Niemöller).

